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 QUEBEC ADMIRALTY DISTRICT

1959  
 Apr. 29,  
 Oct. 20  
 Dec. 28

BETWEEN:

LEVAL &amp; COMPANY INCORPORATED .. PLAINTIFF;

AND

COLONIAL STEAMSHIPS LIMITED ... DEFENDANT.

*Shipping—Damage to cargo—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Art. IV, Para. 2(a) and (c)—Damage to ship brought about by peril, danger or accident of the sea—Negligence due to navigation only—Control of ship not taken over by defendant—Action taken by defendant's assistant marine superintendent that of one of defendant's servants.*

The plaintiff claims for damage to a cargo of flax seed transshipped at Port Colborne to defendant's barge the *David Barclay* for carriage to Montreal in a single uninterrupted voyage. Plaintiff alleges that defendant in breach of its undertaking and in dereliction of its duty failed to deliver the cargo in the same good order and condition in which it was received, but on the contrary on arrival in Montreal it was found to be wet, short and damaged.

Defendant pleads the *Water Carriage of Goods Act, 1936* and alleges that the damage resulted from the fact that the *David Barclay* rubbed the starboard bank of the Soulanges Canal very heavily on its voyage from Port Colborne to Montreal.

*Held:* That the damage to the *David Barclay* resulting from the collision was occasioned or brought about by a peril, danger or accident of the sea within the meaning of Art. IV, Par. 2 (c) of the *Water Carriage of Goods Act* and since the *David Barclay* was seaworthy at the commencement of the voyage and at all times prior to her contact with the canal bank defendant was not liable in respect of such damage to the cargo as resulted directly from the collision.

2. That any negligence on the part of the Master of the *David Barclay* following the collision which resulted in damage to the cargo was negligence related primarily to the navigation or the management of the ship for which defendant cannot be held responsible in view of the exception afforded by Art. IV, Para. 2 (a) of the *Water Carriage of Goods Act*.

3. That action taken by the assistant marine superintendent of defendant subsequent to the collision and without reference to defendant's head office or any executive officer of defendant and solely on his own initiative and on the basis of the Master's telephone reports did not amount to a taking over of control of the vessel by the defendant in such a manner as to render it liable for any negligence there may have been thereafter on the part of the Master, crew or other servants of defendant in the navigation or management of the ship.
4. That anything done by the assistant marine superintendent of defendant was done by him on his own responsibility as one of defendant's servants within the meaning of Art IV, Para. 2 (a) of the *Water Carriage of Goods Act*.
5. That defendant has brought itself within the exception provided by Art. IV of the *Water Carriage of Goods Act*.

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ACTION for damage to cargo shipped on defendant's barge.

The action was tried before the Honourable Mr. Justice Arthur I. Smith, District Judge in Admiralty for the Quebec Admiralty District at Montreal.

*C. Russell McKenzie, Q.C.* and *R. Gerard Sampson* for plaintiff.

*Léon Lalonde, Q.C.* for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

A. I. SMITH, D.J.A. now (December 28, 1959) delivered the following judgment:

The plaintiff claims for damage to a cargo of No. 1 Canada Western Flax Seed carried by the defendant's vessel *David Barclay* from Port Colborne to Montreal. This cargo of 96,599.3 bushels was part of a total of 422,038.8 bushels entrusted to and accepted by defendant for carriage from Port Arthur to Montreal, with transshipment at Port Colborne to the defendant's barge *David Barclay*, as appears by bill of lading dated the 11th day of November, 1955.

The plaintiff's statement of claim contains no allegation of negligence on the part of the defendant, the plaintiff contenting itself with alleging the contract of carriage and that the defendant, in breach of its undertaking and in dereliction of its duty in the premises, failed to deliver the cargo in the same good order and condition in which it was

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received at the time of shipment. It is alleged that on the contrary the said grain on its arrival in Montreal was found to be wet, short and damaged.

The bill of lading provides that the contract is governed by the *Water Carriage of Goods Act*, 1936.

By its statement of defence, the defendant alleges that the bill of lading speaks for itself, admits that the 96,599.3 bushels of flax seed were transhipped at Port Colborne to defendant's vessel *David Barclay* and transported to Montreal, arriving there on November 11, 1955. Otherwise the allegations of plaintiff's statement of claim are either denied or declared to be outside of the defendant's knowledge. The defendant alleges, moreover, that if the damage was caused, as alleged, it arose or resulted from the fact that the ship *David Barclay* rubbed the starboard bank of the Soulanges Canal very heavily on its voyage from Port Colborne to Montreal. It is alleged that the contract of carriage between the parties is governed by the terms and conditions of the *Water Carriage of Goods Act*, 1936, and by the rules relating to bills of lading comprised in the schedule of said act and all the terms, provisions and conditions of said act are invoked and, in particular, Art. IV, Rule 2(a) and (c).

The parties entered an admission that the loss sustained by plaintiff by reason of the damage to its cargo totalled the sum of \$27,619.92 and the plaintiff's case was presented on the basis of this admission and the documents filed, without further proof.

The defendant brought evidence to show that the *David Barclay* had been inspected prior to the voyage and had been found to be dry and in satisfactory condition for the carriage of the said cargo. I am satisfied, and counsel for the plaintiff did not argue otherwise, that the proof justifies the conclusion that the *David Barclay* was in seaworthy condition when she sailed from Port Colborne at the commencement of the voyage. The evidence is that the voyage to Montreal proceeded without incident until the vessel reached a point about two miles east of Lock No. 5 in the Soulanges Canal when she sheered suddenly and struck a stone on the starboard bank of the canal.

The collision with the canal-bank occurred at about 2:00 a.m. on November 10 and the mate Fortier, who was on the bridge at the time, immediately sent a man to take soundings in No. 2 bilge, where water was found to an approximate depth of 14 feet. The pumps were put in operation and the master, who was asleep in his cabin, was called.

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It was noted that the ship had a slight list to starboard. She proceeded however to Lock No. 4 where it was ascertained that her draft had not altered since the first soundings taken and she therefore continued down to Lock No. 3, where the master communicated with the canal superintendent and requested the services of a diver. The vessel then descended to Lock No. 1, where she was joined by a diver and the assistant canal superintendent who ordered her to proceed to the foot of the canal. These instructions were complied with and the vessel on reaching the eastern end of the canal was turned about and moored to the bank. Her draft was again checked and it was found not to have altered.

A diver descended and went along the entire length of the vessel in an effort to locate the hole through which the water had entered the bilge. At the end of one hour he surfaced and reported that he had been unable to find any hole or break in the vessel's skin. Captain Sauvageau however was not satisfied and requested him to go down and make a second examination which he did and after an hour and a half he reported that he had again failed to find any hole or break in the vessel's side. A further check of the vessel's draft satisfied the master that it remained unchanged. He had two or more telephone conversations with the defendant's assistant marine superintendent, Captain Walton, in the course of which the collision and the results of the diver's exploration were reported. On the basis of these reports the master was instructed by Walton to proceed to Montreal.

The vessel left Cascades around noon on the 10th of November and tied up at elevator No. 2 in the harbour of Montreal around 10 o'clock that evening. It was found that

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her draft had not altered and around 8 o'clock the following morning she commenced to discharge cargo. However, in the afternoon, it was noticed for the first time that water was finding its way from No. 2 bilge into No. 2 cargo hold and a tarpaulin was hung against the starboard side of the vessel with the hope that the suction created by the pressure of the water through the hole in the ship's side might draw the tarpaulin against the break and thus prevent the further entry of water.

There is evidence to the effect that little water had actually gained access to the cargo prior to the commencement of unloading, and this is accounted for by the fact that so long as the cargo maintained pressure against the limber boards at the top of No. 2 bilge, water could not enter the hold, but as soon as this pressure was removed water was permitted entry.

By way of rebuttal the plaintiff brought two expert witnesses, Messrs. Crocker and Finch, both of whom were critical of the course followed and the methods adopted by those in charge of the *David Barclay* following the collision. These witnesses expressed the opinion that, in the circumstances, the failure to locate and stop immediately the hole which was finally discovered in the vessel and the fact that the *David Barclay* continued on to Montreal although it was known that the vessel was leaking, amounted to negligence and lack of good judgment in respect to the care and protection of the cargo.

I am inclined to agree that there was negligence on the part of those in charge of the *David Barclay* in regard to the management of the vessel subsequent to the collision with the canal-bank. It would appear that a more thorough examination of the vessel in the Soulanges Canal would have revealed the hole which was later discovered and which might have been stopped by temporary repairs prior to the trip from Soulanges Canal to Montreal.

On the other hand, I have no doubt that the damage to the *David Barclay* resulting from the collision was occasioned or brought about by a peril, danger or accident of the sea within the meaning of Art. IV, para. 2(c) of the *Water Carriage of Goods Act*:

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*The "Xantho"*<sup>1</sup>; *Keystone Transports Limited v. Dominion Steel Coal Corporation*<sup>2</sup>; *Toronto Elevators Limited v. Colonial Steamships Limited*<sup>3</sup>; *Canadian National Steamships v. Baylis*<sup>4</sup>; *Grain Growers Export Co. v. Canada Steamship Lines*<sup>5</sup>.

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If this is so, and since it was established that the *David Barclay* was seaworthy at the commencement of the voyage and at all times prior to her contact with the canal-bank, the defendant was relieved of the responsibility in respect of such damage to cargo, if any, as resulted directly from the said collision. (*Water Carriage of Goods Act*, Art. IV, para. 2(c)).

Whether the damage to plaintiff's cargo was in whole or in part the result of collision or of what followed may be debatable. The position taken by plaintiff however is that the damage to its cargo was not the direct result of the collision, but was caused by the failure and neglect of those in charge of the vessel following the collision to properly care for and protect the cargo in compliance with Art. III (2) of the *Water Carriage of Goods Act*.

The defendant on the other hand, relying upon paragraph (a) of Rule 2 of Article IV of the *Water Carriage of Goods Act*, takes the position that, since it was proved that the vessel was seaworthy at the commencement of the voyage, even if there is evidence to support a finding of negligence on the part of the master or servants of the owner it is negligence in the navigation or management of the ship in respect of which the defendant is relieved of responsibility.

Stated in general terms what is deemed to be negligence relating to the navigation or management of the vessel (as distinguished from that which relates to the carrier's duty

<sup>1</sup> (1887) 12 A.C. 503

<sup>3</sup> [1950] Ex. C.R. 371

<sup>2</sup> [1942] S.C.R. 495

<sup>4</sup> [1937] S.C.R. 261

<sup>5</sup> (1918) 40 O.L.R. 330; (1919) 59 Can. S.C.R. 643.

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to care for and protect the cargo) is negligence relating to something done or omitted which relates primarily to the care and preservation of the vessel.

The courts, on various occasions, have been called upon to distinguish between negligence relating to the care and protection of cargo for which the carrier is responsible and neglect in the navigation or management of the vessel in respect of which the carrier is exempted from responsibility. For example, in the case of *Gosse Millard Limited v. Canadian Government Merchant Marine*<sup>1</sup>, it was held that the failure to properly cover a hatch with a tarpaulin amounted to negligence in respect of the care and protection of the cargo which rendered the carrier liable.

Similarly, in the case of the *Ferro*<sup>2</sup>, where a cargo was damaged owing to improper stowage, it was held that the matter of stowage did not relate to the management of the vessel, and the carrier was therefore liable for negligent stowage.

When however the negligence is such as to satisfy the court that the primary concern of the master was the safety of the vessel, such negligence is deemed to be negligence relating to the navigation or management of the ship and the carrier is relieved of responsibility.

Thus, in the case of *The Rodney*<sup>3</sup>, where a pipe became clogged and was improperly cleared with the result that water entered and damaged the cargo, the negligence and failure to properly clear the pipe was held to be negligence relating to the management of the ship for which the carrier was not responsible. (*The Glenochil*<sup>4</sup>).

The fact that the negligence may have related also to the protection of the cargo does not disentitle the carrier to the exemption afforded by Art. IV, Rule 2, if what was done or omitted related primarily to the navigation or the management of the ship.

I am convinced that the steps taken by the master of the *David Barclay* following her collision with the canal-bank related primarily to the safety and preservation of the vessel. The proof shows that her No. 2 starboard bilge filled rapidly and remained filled notwithstanding the operation

<sup>1</sup>[1929] A.C. 223.

<sup>2</sup>[1893] P. 38.

<sup>3</sup>[1900] P. 112.

<sup>4</sup>[1896] P. 10.

of the vessel's pumps. The ship developed a list and I have no doubt that the situation was such as to give the master concern for the safety of his vessel. The testimony of Mr. Crocker indicates that in his opinion the *David Barclay* was in jeopardy following the collision.

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The Supreme Court in the case of *Kalamazoo Paper Company v. Canadian Pacific Railway*<sup>1</sup>, which involved circumstances similar in some respects to those which pertain to the present case, held that, assuming that there was failure on the part of the ship to utilize the available pumping facilities and that damage to the cargo resulted, this was neglect on the part of the master "in the management of the ship" within the meaning of Rule 2(a) of the statute and the defendant was not liable. In that case the master, having brought his ship safely to the wharf with only a small quantity of water in the forehold, and having by causing her to be grounded on the mud bank obviated the danger of her sinking, did nothing to prevent the rise of water in the forehold other than to continue to use the bilge pump which was quite inadequate.

In *Kalamazoo Paper Company v. Canadian Pacific Ry. (supra)*:

Estey J. page 371:

The primary concern of the master in keeping the pumps going was to get out as much water as he could so that the bulkheads would not give way and that possibly the ship might continue her course. That being the primary concern the fact that the pumping did tend to preserve or affect "the safety of the cargo", as stated by Gorell Barnes J. in the *Rodney*, does not take the case out of the exception of Art. IV, Section 2 (a).

Rand J. at page 366:

The further question is whether an act or omission in management is within the exception when at the same time and in the same mode it is an act or omission in relation to care of cargo .....the necessary effect of the language of Article III (ii) "subject to the provisions of Article IV" seems to me to be that once it is shown that the omission is in the course of management, the exception applies, notwithstanding that it may be also an omission in relation to cargo. To construe it otherwise would be to add to the language of Paragraph (a) the words "and not being a neglect in the care of the goods".

<sup>1</sup> [1950] S.C.R. 356.

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Locke J. at page 379:

Accepting the findings of fact by the learned trial judge, that there was negligence on the part of the master appears to me to be undoubted, That this negligence resulted in damage to the cargo is equally beyond question. Any negligence in failing to take prompt steps to avoid the inroad of seawater into the holds of a vessel carrying perishable cargo must, in my view, be also negligence either in the navigation or the management of the ship. It is said for the appellant that when the *Nootka* was run aground at Quatsino Wharf she was safe from sinking, so that the failure to operate the available pumps did not jeopardize the safety of the vessel and that the presence of the large accumulation of water in the forehold did not constitute a danger to the bulkhead, but I think it must be accepted upon the authority of *The Rodney* that this is not decisive of the matter. Navigation, as indicated by the decisions in *Good v. London Steamship Owners' Association and Carmichael v. Liverpool Sailing Ship Owners' Association*, does not refer merely to the time when the vessel is at sea. The decision in *The Accomac* (1890) 15 P.D. 208, is clearly distinguishable on the facts for there the voyage had ended at the time the events occurred giving rise to the claim. I think the failure to exercise reasonable diligence to prevent further water entering the forehold falls within the same category as the failure of the crew to close the bilge-cock in Good's case, and the port in Carmichael's case, and was "neglect in the navigation of the ship" within the terms of the exception. The learned trial judge considered the matter as one of negligence in the management of the ship and, having come to a conclusion on this aspect of the matter, no doubt considered it unnecessary to decide further whether there was not also negligence in the navigation of the ship. The same neglect may, in my opinion, be both in navigation and in management. Adopting the language of Gorell Barnes J. in *The Rodney*, there was here improper handling of the ship as a ship which affected the safety of the cargo and this was fault or error in management. The learned trial judge has said that the neglect was essentially a failure in a matter that vitally affected the management of the ship, a conclusion with which I respectfully agree.

It is my opinion therefore that if there was negligence on the part of the master of the *David Barclay* following the collision which caused or brought about the damage to plaintiff's cargo, it was negligence which related primarily to the navigation or the management of the ship for which negligence the defendant cannot be held responsible in view of the exemption afforded by Art. IV, 2(a) of the statute.

After the trial, counsel for plaintiff referred the court to the case of the *Isis*<sup>1</sup>, thereby, in my opinion, introducing a proposition which until then had not been raised either by the written pleadings, or in the course of the argument at the trial. For this reason, counsel were invited to argue

the question of the applicability and effect of the holding in the *Isis* case. This was done and I have now had an opportunity of considering the case in the light of this argument.

Mr. McKenzie, basing himself upon the *Isis* case argued that after the collision of the *David Barclay* with the canal-bank her owners intervened and took over control of the vessel from the master, so that any fault or negligence there may have been thereafter was fault for which the owners are personally liable, their position being exactly as if the trip from Soulanges Canal to Montreal had constituted a new and independent voyage or, at least, a new and distinct stage of the voyage for which the owner was obliged to exercise all reasonable diligence to make the vessel seaworthy.

Nothing of this was alleged in plaintiff's statement of claim or elsewhere in the written pleadings. On the contrary, it was alleged that the contract of carriage was for a voyage from Port Colborne to Montreal.

To succeed on this ground it seems to me that the plaintiff was obliged to both allege and prove that the defendant had intervened and taken over control of the vessel in such a manner as to make it personally responsible for any unseaworthiness in the ship and for such negligence as there may have been in its subsequent navigation or management and, in the absence of such allegations, I do not believe that this proposition was available to the plaintiff as a basis for its claim. (*General Rules and Orders In Admiralty*, Rule 70; *Roscoe Admiralty Practice* 5th Edit. Order 19, Rule 15, p. 299.)

I propose, however, for the purposes of the argument, to consider the question of the applicability and effect of the *Isis* case as if this issue had been properly raised by the written pleadings.

There is at least some reason to doubt the applicability of the holding in the *Isis* case. In the first place, it was decided under the Harter Act and prior to the enactment of the *United States Carriage of Goods by Sea Act, 1936*, and one important difference between these statutes is that the latter enactment (as did the Canadian Act) did away with the obligation which rested upon the ship-owner under the Harter Act to warrant the ship absolutely seaworthy

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and rendered him liable for any unseaworthiness whether or not it was actually related to the damage complained of.

Assuming however that the principles upon which the *Isis* case was decided are applicable, it seems to me that the circumstances of the case now under consideration are very different from those which pertained in the *Isis* case.

It would appear that the testimony of Captain Walton, assistant marine superintendent of the defendant, heard as a witness for the defence, prompted the plaintiff to invoke the holding in the *Isis* case. At any rate the plaintiff's argument that the defendant had intervened while the vessel was in the Soulanges Canal and taken over control of the ship from the master is based entirely on the following portions of Captain Walton's testimony:

Q. Will you tell the Court what you personally know about this incident in the Soulanges Canal during the night from the 9th to the 10th of November 1955?

A. I had a call from Captain Sauvageau—I cannot recall the exact hour but it was early, before I went to work—reporting that he had damage, that he had struck the canal bank and suspected he had a hole in her, because his bilge was full of water; and that he had called a diver; and he had given instructions to tie up and make the inspection; and he reported to me later that the diver was unable to find anything.

I asked him when he first called as to what the ship's draught was. He told me. I asked him if it had increased any from before. He said "No." I asked about list. He said "No, nothing noticeable" and so I asked him, after the diver had made his report to call me back to decide what we could do, which he did around eleven or twelve o'clock somewhere. I cannot recall the hour exactly but he did call. So, I asked him again about the list and the draught and he said there was no change; that the diver could not find any damage.

So I instructed him under those circumstances to proceed to Montreal. He had to get her down here to get her unloaded and to get something done to protect the ship and cargo and I believe he arrived here the following evening sometime.

Q. Now then, when did you next hear about the *David Barclay*?

A. When she was unloading the next day. We heard she had damage and that things were being taken care of in Montreal.

It seems to me that the present case is distinguishable from that of the *Isis* case in a number of important respects.

*First:* The contract of carriage entered into between plaintiff and defendant was for a single uninterrupted voyage from Port Colborne to Montreal, whereas in the *Isis*

case the contract stipulated several stops en route to final destination for the discharging of cargo thereby suggesting the concept of a voyage by stages.

*Second:* Whereas in the *Isis* case facilities existed at Bremen, one of the stops en route, by the use of which repairs could have been effected to the vessel, no such facilities were available to the *David Barclay* in the Soulanges Canal. Moreover, in the *Isis* case (in which, as in the present case, the owner of the vessel was a limited company), the head office of the owner was immediately advised of the accident and of the damage to the vessel and the head office sent its marine superintendent to the scene with instructions to take charge which, in fact, he did.

In the present case, there is no evidence that the owner, Colonial Steamships Limited, was advised of the vessel's collision with the canal-bank or of any matter concerning her condition prior to her arrival at Montreal. The testimony of Captain Walton is that he received a telephone call at his home early in the morning of the 10th of November from the master of the *David Barclay*. There is nothing to indicate that Walton notified or communicated with anyone at the defendant's head office. On the contrary, it appears that he took it upon himself to obtain a further telephone report from the master concerning the damage to the vessel and its apparent effect on her draft, and, on the basis of these oral reports, he, on his own responsibility, instructed the master to proceed to Montreal.

The question which, of course, immediately suggests itself is whether or not Captain Walton, the assistant marine superintendent of the defendant, was not merely the "servant" of the defendant within the meaning of Article IV, para. 2(a) of the *Water Carriage of Goods Act*.

Was the action taken by Walton merely that of a servant of the defendant, or was it one to which the defendant was privy and for which it is therefore personally liable?

In the words of Lord Haldane in *Leonard Carrying Company v. Asiatic Petroleum*<sup>1</sup>. To make it the act of the company rather than that of the servant of the company "It must be fault of some one for whom the company is not

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<sup>1</sup> [1915] A.C. 705 at 713.

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merely liable on the principle of *respondeat superior* but somebody for whom the company is liable because his action is the very action of the company itself”.

Hamilton L.J. in the court of appeal<sup>1</sup> in the same case wrote that to be the action of the company and not that of a servant of the company it must be that of a person “with whom the chief management of the company resides”.

In *Smitton v. Orient Steam Navigation Co.*<sup>2</sup>, Channell J. held that it must be fault of the managing authority, e.g. the directors.

Applying these principles to the facts of the present case, I am unable to conclude that the action of Captain Walton, the defendant’s assistant marine superintendent, taken without reference to the defendant’s head office or any executive officer and solely on his own initiative and on the basis of the master’s telephone reports, amounted to the taking over of control of the vessel by the defendant in such a way as to render it liable for any negligence there may have been thereafter on the part of the master, crew or other servants of the defendant in the navigation or management of the ship. On the contrary, I am of the opinion that what Captain Walton did was done by him on his own responsibility acting as one of the defendant’s servants within the meaning of Article IV, para. 2(a) of the *Water Carriage of Goods Act*.

On the whole therefore I conclude that the defendant was successful in bringing itself within the exceptions provided by Art. IV of the *Water Carriage of Goods Act* and has therefore made good its defence to the present action.

Accordingly, the plaintiff’s action is dismissed, with costs.

*Judgment accordingly.*

<sup>1</sup>[1914] 1 K.B. 437.

<sup>2</sup>(1907) 12 Com. Cases 270 at 271.